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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 06/02/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered *Defendant's Motion to Strike Indictment, in part, and Death Notice, in part, Re: Multiple Constitutional Violations,* the State's response, and the defendant's reply. The Court has also considered the arguments of counsel.

Defendant is charged with felony murder of the child victim, with child abuse alleged as the predicate felony (Count 1), and child abuse of the victim (Counts 2-3). The State has noticed its intention to seek the death penalty, alleging three aggravating circumstances: (F)(2)(prior serious offense; in this case, the contemporaneous Child Abuse counts); (F)(6)(heinous, cruel or depraved); and (F)(9)(victim under age 15). He asserts that the Indictment should be stricken because the charges are duplicative and multiplicative, and as a consequence, violate a number of his constitutional rights.

Defendant first argues that allowing a serious offense that was committed contemporaneously with the murder to satisfy the (F)(2) aggravator results in double counting and fails to genuinely narrow the class of persons eligible for the death penalty.

Regarding this Eighth Amendment challenge, the Arizona Supreme Court rejected this argument in *State v. Forde*, 233 Ariz. 543, ¶¶105-108, 315 P.3d 1200 (2014). In *Forde*, the defendant's contemporaneous convictions for first degree burglary, aggravated assault, and robbery established the (F)(2) aggravator. The Court held:

> The (F)(2) aggravator does not violate the Eighth Amendment. Section 13-751(J) lists twelve offenses that constitute "serious offenses" along with "[a]ny dangerous crime against children," which applies to twenty-one additional offenses. A.R.S. § 13-705(P)(1). Consequently, the aggravator appropriately channels and limits the sentencer's discretion by explicitly identifying which offenses qualify as "serious offenses." *See Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (approving "clear and objective standards that provide specific and detailed guidance") (citation and internal quotation marks omitted).

*Forde*, at ¶107.

The fact that an element of First Degree Murder is also an aggravating factor does not render Arizona's scheme insufficiently narrow. *See State v. Cruz*, 218 Ariz. 149, 181 P.3d 196 (2008). As the Supreme Court noted in *Forde*, A.R.S. §13-751(F)(2) clearly permits the State to rely on a contemporaneous offense to prove this aggravating circumstance. *See also*, *State v. Morris*, 215 Ariz. 324, 341, ¶78, 160 P.3d 203, 220 (2007) (State properly used multiple murder convictions from guilt phase as prior serious offenses in aggravation phase.). Moreover, "[t]he (F)(2) aggravating factor is a recidivist provision," *State v. Pandeli*, 215 Ariz. 514, 522-23, ¶ 16, 161 P.3d 557, 565-66 (2007), providing moral justification for basing death eligibility on the fact that a defendant has committed other, serious offenses.

Likewise, the fact that a defendant who murders a person during the course of a felony becomes death eligible based on the (F)(2) aggravator of the contemporaneous convictions of the predicate felonies does not result in insufficient narrowing. The offense of felony murder does not require that the defendant have been charged with and convicted of the underlying predicate felony. *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996)("The jury must simply find that the defendant committed or attempted to commit it."); *State v. Johnson***,** 215 Ariz. 28, 156 P.3d 445 (App. 2007).

Here, the (F)(2) aggravator is not that the murder was committed during the course of the predicate felony, but rather, that the defendant also committed a serious offense. Because the defendant does not have to be charged with or convicted of the underlying predicate felony to be found guilty of felony murder, he is thus not automatically eligible for the death penalty.

For the same reason, the charges do not violate the Double Jeopardy Clause and are not multiplicitous. Charges are multiplicitous if they charge a single offense in multiple counts. *Merlina v. Jejna*, 208 Ariz. 1, 4, 90 P.3d 202 (App. 2004), review denied. Multiplicitous charges raise the potential that a defendant may be subjected to double punishment. *Id*. *State v. Powers*, 200 Ariz. 123, 125, 23 P.3d 668 (App.2001), *approved by* 200 Ariz. 363, 26 P.3d 1134 (2001).

Here, the defendant is not charged with the same offense in any count of the Indictment. He is charged with First Degree Murder in Count 1, and the separate offenses of Child Abuse in Counts 2 and 3. If convicted of Count 1, he will not have been prosecuted twice for the same offense or be punished twice for the same offense. He cannot potentially receive two sentences for Count 1. The Arizona Supreme Court also has rejected the argument that charging both the predicate felony and the felony murder results in using one act to secure multiple convictions: "The offenses are separate." *State v. Miniefield*, 110 Ariz. 599, 602, 522 P.2d 25, 28 (1974). Thus, in *Miniefield*, there was no error in either the charging or convicting of the defendant for both the predicate felony (arson), and felony murder based on that predicate felony. *Id.*

Defendant next argues that convictions for Child Abuse and felony murder predicated on Child Abuse would violate his right against double jeopardy. The Double Jeopardy Clause bars multiple prosecutions and multiple punishments for the same offense. As noted above, the defendant has not been charged with the same offense in any count of the Indictment and is not being subjected to multiple prosecutions. If convicted of both felony murder and Child Abuse, he also will not be subjected to multiple punishments. As long as they do not result in multiple punishments, the charges alone do not violate double jeopardy. *Merlina*, 208 Ariz. at ¶14. The Arizona Supreme Court also reaffirmed its holding that consecutive punishments for felony murder and the predicate felony for that felony murder do not violate the Double Jeopardy Clause. *State v. Martinez*, 218 Ariz. 421, 439, ¶81, 189 P.3d 348, 366 (2008) (citing *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983)). As the Court of Appeals noted in *State v. Siddle*, 202 Ariz. 512, 517, ¶15, 47 P.3d 1150, 1155 (App. 2002), "[f]elony murder and the predicate felony are distinct crimes and may be punished separately in a single trial without running afoul of double jeopardy principles."

The defendant's reliance on *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (App. 2006), *review denied*, is misplaced. *Lemke* did not hold that the State may not charge a defendant with separate counts of felony murder and the predicate felony; indeed Lemke was so charged. Rather the Court of Appeals held that a conviction for theft as a lesser-included offense of the separate armed robbery count was not an "implicit acquittal" of the armed robbery alleged as the predicate in the felony murder count because the jury hung on felony murder. Therefore, Lemke could be tried a second time for felony murder.

*Lemke* involved the Double Jeopardy Clause's prohibition against a second prosecution for the same offense after acquittal. The prohibition against multiplicitous charges protects a defendant against a different harm: multiple punishments for the same offense. As noted, multiplicitous charges do not subject a defendant to double punishment so long as multiple punishments are not imposed. *Merlina*, 208 Ariz. at ¶14.

Defendant next argues that using the contemporaneous convictions of Counts 2 and 3 as a (F)(2) aggravator that makes the defendant death eligible also violates his rights to equal protection. As previously noted, however, the (F)(2) aggravator is a recidivist provision, and the State has a compelling or rational basis for basing death eligibility on the fact that a defendant has committed other, serious offenses.

Defendant next argues that the (F)(9) aggravator fails to narrow the class of death-eligible defendants as constitutionally required and violates his double jeopardy rights. In *State v. Nelson*, 229 Ariz. 180, ¶¶25-34, 273 P.3d 632 (2012), the Arizona Supreme Court held this aggravator meets constitutional requirements and specifically rejected the arguments that it fails to genuinely narrow the class of persons eligible for the death penalty, is vague or overbroad, violates equal protection or due process, and subjects a defendant to cruel and unusual punishment.

As to the issue of double counting child abuse involving a person under age 15 as both a predicate felony and an aggravator, the Court notes that Arizona law allows for an element of the crime to also be used to aggravate a sentence. *State v. Cruz*, 218 Ariz. 149, 181 P.3d 196 (2008)(victim's status as police officer used to elevate the murder from second to first degree murder and also as aggravator); *State v. Greene*, 192 Ariz. 431, 444, 967 P.2d 106, 119 (1998)(robbery and pecuniary gain); *State v. Lee*, 189 Ariz. 608, 620, 944 P.2d 1222, 1234 (1997)(armed robbery and pecuniary gain).

The defendant finally argues that alleging both (F)(6) and (F)(9) aggravators results in impermissible double counting of the victim's age as to the murder. However, the Supreme Court has repeatedly held that these two allegations do not impermissibly count the victim's age twice when the jury is properly instructed:

> Villalobos has not demonstrated impermissible double counting. The prosecutor's comments regarding Ashley's age, size, weight, and references to her as a child appropriately encouraged the jury to consider whether she was helpless at the time of the murder. *See State v. Bolton*, 182 Ariz. 290, 310 n.6, 896 P.2d 830, 850 n.6 (1995)(evaluating child's defenselessness as part of (F)(6) aggravator). The prosecutor expressly told the jury that it could consider physical size as evidence of helplessness, but emphasized that he was "talking about her size, not her chronological age." This Court has found similar comments appropriate in cases involving both the (F)(6) and (F)(9) aggravators. *See* [*State v. Velazquez*, 216 Ariz. [300] at 307 ¶23, 166 P.3d [91] at 98; *State v. Medina*, 193 Ariz. 504, 512 ¶ 26, 975 P.2d 94, 102 (1999). Moreover, the jury was expressly instructed not to consider age when determining whether the crime was especially

> heinous, cruel or depraved. *See Velazquez*, 216 Ariz. at 307 ¶ 24, 166 P.3d at 98 (citing such an instruction in rejecting double-counting argument).

*State v. Villalobos*, 225 Ariz. 74, ¶29, 235 P.3d 227 (2010). *See also, State v. Payne*, 233 Ariz. 484, ¶151, 314 P.3d 1239 (2013).

As in these cases, the Court will similarly instruct the jury in this case to not consider the victim's age in determining whether the (F)(6) aggravator has been proven.

Therefore, for all of these reasons,

IT IS ORDERED denying Defendant's Motion to Strike Indictment, in part, and Death Notice, in part, Re: Multiple Constitutional Violations.